# No. 2947

IN THE

# UNITED STATES
# CIRCUIT COURT OF APPEALS
## FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, a Corporation of the State of Maryland,

Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and One of the Counties of the State of Washington, and

J. L. GLAZEBROOK, as County Treasurer of said Pacific County,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, Judge.



## Brief of Plaintiff in Error

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## Brief of Plaintiff in Error

The First International Bank was engaged in banking business at South Bend, Washington. J. L. Glazebrook was County Treasurer. The bank procured the Maryland Casualty Company as surety to execute a depositary bond to guarantee deposits to be made in the bank by Pacific County.

Such bond was executed over date of July 9th, 1915 by the bank as principal and Maryland Casualty Company as surety. (Tr. p. 811). The bond was executed at Seattle, about one hundred and fifty miles from South Bend, and mailed to the Bank. Glazebrook says the bond was delivered to him on July 12th. The statute requires the bond to be *filed with the County Clerk* after first being approved by two officers of the County. July 14th, Glazebrook addressed a letter to the Surety at Seattle saying that the Prosecuting Attorney and legal adviser of the County, and himself refused to approve the bond. (Tr. pp. 38 and 39). When this letter was mailed is uncertain, but it reached Seattle on Saturday afternoon, July 17th after business hours, and was on Monday, July 19th delivered to the agent who wrote the bond. The bank kept open its doors until noon on Saturday, July 17th. There is a dispute as to whether the Bank did any real business on Saturday, July 17th, but in any event, it never opened its doors after noon of Saturday, the 17th. Sometime during the day on Monday, July 19th, the bond was filed with the County Clerk, it being admitted that the bond was filed after the bank closed. When filed it had upon it an undated approval of Glazebrook and the Prosecuting Attorney. On Monday the 19th, the County had a balance in the Bank of $52,457.97. Beside the bond of Mary-

land Casualty Co., the County held the following securities:

| | |
|---|---|
| Fidelity & Deposit Co. | $20,000.00 |
| Aetna Accident & Liability Co. | 5,000.00 |
| Equitable Surety Co. | 5,000.00 |
| New Amsterdam Casualty Co. | 6,000.00 |
| The Illinois Surety Co. | 10,000.00 |
| Municipal Bonds & Mortgages | 10,525.65 |
| | $56,525.65 |

Or, in other words, the County held over and above the surety of Maryland Casualty Co., securities amounting to $56,525.65. On each of July 13th and 14th, $4000 was deposited but one $4000 did not increase the amount, as a check for $4,000 was drawn on same day (Tr. p. 53). The Illinois Surety Co. resisted payment and contemporaneously with this action suit was brought against it by the County. It is made to appear in this record over objection of Maryland Casualty that the Court held the Illinois Surety released. This action was brought by the County to recover $10,000 the full amount of the bond. Judgment having gone for the County, defendant appeals:

## SPECIFICATION OF ERRORS:

The Honorable Trial Court erred:

1st: In finding for the plaintiff and against the defendant.

2nd: In denying defendant's petition for new trial.

3rd: In finding and adjudging that the bond had been accepted by the County.

4th: In finding and adjudging that the bond was one to secure past deposits.

5th: In finding and adjudging that Section No. 8327 of Remington & Ballinger Code of Washington, is applicable to depositary bond.

6th: In finding and adjudging that the First International Bank had been properly designated as a County Depositary.

7th: In finding and adjudging that the surety was liable for any sums deposited prior to July 19th, or that the bond had been accepted prior to that date.

8th: In finding and adjudging that the bond became at any time a binding obligation upon the surety.

9th: In entering final judgment in favor of the plaintiff and against the defendant.

10th: In receiving evidence that the bond covered prior deposits and receiving any evidence under the complaint of any deposit made after the acceptance of the bond, and in receiving evidence of two deposits of $4,000 each; in receiving evidence that any money was on deposit prior to the acceptance of the bond, because there was no such allegation in the complaint; and erred in receiving any evidence under the complaint, because the same stated no cause of action.

## ARGUMENT

Session Laws, Washington, 1907, Chapter 51, page 74, Remington & Ballinger's Code, Sections 5072-5077 (Tr. pp. 28-29) provide:

(a) At fixed dates and such other times as may be deemed necessary, banks shall be designated by treasurer as depositaries. Such designation must be in writing and no treasurer shall deposit any public money in banks except as provided in the Act.

(b) Before designation shall *become effectual* and entitle deposits, the *bank* shall *within ten days file* with the *county clerk* a bond.

(c) Designation must fix the *maximum amount* of deposits to be carried in the bank.

(d) Bond must be approved by chairman of board, attorney and treasurer, or any two.

(e) Unless so approved bond shall not be *received or filed by the clerk.*

(f) Designation shall not become effectual until written contract is entered into for the payment of interest.

(g) Provisions of the Act shall in no way relieve or release treasurer from liability upon official bond.

The only evidence of designation of this bank as county depositary is found in a qualified admission (Tr. p. 54). The admission is of the mere fact that Glazebrook did in January file a writing designating the bank. There was no admission that any such writing properly or duly executed was filed, and counsel for Surety was careful to state in the record that the admission went no further. There is no admission that it was in the form prescribed; no admission that it contains the requirements of the statute; no admission that any designation *was filed within ten days* of the execution and delivery of the bond as required by the statute. The dates show that this is impossible. The admission is of filing in January, while the bond was not filed until July. No admission and no showing that *maximum* amount was fixed. The burden was upon plain-

tiff to show the maximum amount of deposits this bank could receive and that such amount had not been exceeded. The surety could not be held for any amount above such maximum.

The trial court in his memorandum opinion quotes Section 8327 of the Code (Tr. p. 29) as being a part of the depositary statute, and at page 30 states that this section is applicable. The two statutes are entirely separate and distinct. One is under the head of "official bonds" and was enacted in 1890. The other is under the head of "county depositaries" and was enacted in 1907. The Official Bond Statute will be seen, from an examination of Remington & Ballinger's Code Vol. 2, Sections 8324-8335, to apply only to Fidelity Bonds of Public Officials. To illustrate: Glazebrook, the Treasurer, is under bond to Pacific County as Treasurer of the County. That is his official bond. The Depositary Statute, Section 5076, provides:

> "The provisions of this Chapter shall in no way relieve or release the County Treasurer from any liability upon his official bond as such Treasurer, or any surety upon such bond, and shall in no way affect the duty of the several county treasurers of this state to give the bond as such treasurer now required by law."

This distinction becomes important because it is a vital part of the finding of the trial court. He states expressly in his decision:

> "The last section quoted (that is Section 8327 from the official bond statute) is applicable to a bond of the depositary, such as the one in suit."

The provision that within ten days of the designation bond shall be filed, is mandatory. The Treasurer shall deposit with any depositaries "which have fully complied with all requirements as herein provided" (Sec. 5076). The designation shall not become effectual until a written contract is entered into for the payment of interest (Sec. 5074); the language being "before any such designation or designations shall become effectual and entitle said treasurer to make deposits." In other words, until the treasurer showed affirmatively that the law had been fully complied with, he had no right to deposit the money sued for in a bank, and if he had no right so to deposit it, then the bond which is liable is his *official bond as treasurer,* and not the depositary bond, and it should be immaterial to the treasurer which one of the bonds is pursued. The contract must require the bank to pay two per cent upon its average daily balances, and the contract must be approved by the Board of County Commissioners and the Prosecuting Attorney. The written designation must fix the maximum amount of deposits which is the full extent to which a surety may be made liable. There was abso-

lutely no showing made on the part of the Treasurer to the effect that he had any right to deposit any money in that bank, the admission being solely that six months prior he had filed some sort of written designation without admitting any of its provisions, or that it was either executed or filed in the manner provided by law.

The statute provides that moneys so deposited are "deemed to be in the hands of the Treasurer of the County"; that is to say, the County cannot suffer loss because the money is in the hands of the Treasurer and he has given the County an "official bond" to account for it.

## BOND NOT EFFECTIVE UNTIL FILED

When this depositary law was first enacted, it read:

> "The Bank shall give to the Treasurer a bond to be approved by the Treasurer."
>
> (Rem. & Bal. Code 3943).

This statute was amended to read as follows:

> "Shall within ten days after such designation or designations have been filed, file with the County Clerk of such County a surety bond, which bond must be approved by the Chairman of the Board of County Commissioners, or Prosecuting Attorney and the County Treasurer, or any two of such officers." (Tr. p. 28).

This amendment is significant. The only re-

quirement under the old statute was to "give" a bond to the "Treasurer" to be approved by the Treasurer. In other words, the whole matter was left to the discretion of the Treasurer. The bond was given to the Treasurer and left with the Treasurer and required no approval except his. Under the statute as amended in 1907 the law makes it mandatory that the bond must be "filed with the County Clerk," not with the Treasurer. It does not go into the possession of the Treasurer but of the County Clerk, and is made an official document of the *County Clerk's* office. The approval is not left to the Treasurer, but must be approved by the Chairman of the Board, Prosecuting Attorney and Treasurer, or two of such officers. (There is a question under the language of this statute whether it does not mean that it must be approved by the Chairman of the Board and either the Prosecuting Attorney or the Treasurer. Plaintiff at first admitted this to be the proper construction, but later contended that any two of the three may approve it.) Therefore the Treasurer alone could not even approve this bond. This is not a bond *given by the Treasurer, but by the Bank.* The honorable trial court throughout seemed to treat this depositary bond as a bond given by the Treasurer. The language of the statute is:

"The Bank * * * shall file with the County Clerk of such county a surety bond. (Tr. p. 28).

It was the Bank which solicited this bond from Seattle. The surety sent the bond, not to the Treasurer but to the Bank. The law is perfectly clear. If the Bank desired to receive county deposits it was its duty to file the bond with the County Clerk. The Bank did not file the bond at all. For some reason unexplained in the record the Bank seems to have delivered the bond to Glazebrook. Glazebrook took it to the legal adviser of the County, and he refused to approve it, because it carried a pro rate clause to which he objected. The Bank conveyed to the Surety no acceptance of this bond. Neither did the County, nor anyone else, notify the Bank that it had been accepted. Glazebrook, who never had any right to possession of the bond, kept it until after the bank failed, and then took it up to the County Clerk's office and filed it. The file mark on the bond shows that it was filed on the 19th after the Bank had closed.

When, if at all, did this bond become effectual as a binding obligation upon the surety? Certainly not before its filing with the County Clerk; and it is not contended that the bond could be made liable *after the Bank had failed.*

Is there any question but that the Company could have withdrawn this bond at any time before it was filed with the Clerk?

No premium was paid on this bond and none became due from the Bank until the bond was filed. The Bank owed no premium until the bond was filed. There was no moment prior to the filing of this bond when the surety could have enforced collection of a premium from the Bank. Not only was there no premium paid, but none matured until the 19th, and on the 17th the Bank was closed. Had this bond been accepted and filed when the Bank received it on the 12th, the Bank would no doubt have paid the premium, before it closed.

The Bank never directed the bond to be filed. There is no evidence that the Bank ever consented to its being filed. If it was the fault or neglect of the County Treasurer that the bond lay around and was not filed, and that the Company was prevented from obtaining its premium upon the bond, then certainly the County or the Treasurer are estopped from asserting a claim upon the bond. If Glazebrook on the 19th, after the bank had closed, had destroyed the bond, there could be no recovery against the surety. Suppose Glazebrook on the 19th had returned the bond to the Company, certainly there could be no recovery upon the bond.

Glazebrook had no more right to file the bond on the 19th after the bank closed than he had to destroy it or to return it to the Company. The filing on the 19th after the Bank closed, without the knowledge or consent of the Bank, or the Surety, in no way gave binding force to the bond.

## THERE WAS NO ACCEPTANCE OF THE BOND

Upon conditional guaranties, acceptance is always necessary to bind the surety. That the guaranty in this case is a conditional one is not questioned.

> "It is eminently improper and ineffectual for the insured, holding a policy subject to his approval and final acceptance, if satisfactory, to accept the same after a loss has actually occurred. Finally it should be observed that there can be no legal delivery to the insured so long as there are unperformed conditions."
>
> Frost on the Law of Guaranty Insurance, Sec. 34.

> "Again it may be observed there is no obligation resting upon the insurer to accept the proposal or application for guaranty insurance. Therefore, delay in acting thereon will not in itself warrant the presumption of acceptance. In brief, the proposal and application for insurance, whether they be oral or in writing, *must be accepted before* they become binding contracts. There must be an actual acceptance

thereof, some act to bind the insurer, or some act which must be done which is equivalent thereto, and from which the insurers cannot recede without liability."

Frost, Sec. 22.

"In the federal courts and in those of a majority of our states, however, it is the established rule that where the guarantee is of a future credit *and is not signed at the request of the creditor or in his presence* and with his knowledge, or upon a valuable consideration moving from him to the guarantor or under seal, the latter is not bound from the *fact merely that the creditor makes advances* to the principal thereon, but from the further fact that the guarantor *has notice* within a reasonable time that the guaranty has been accepted, or, what is the same thing, that it has been acted upon, and the rule is ordinarily the same whether the offer is addressed to a particular person or generally, and whether it contemplates a single credit or a series of credits to the principal."

Spencer on Suretyship, page 48, Sec. 38.

In this case the bond was not signed at the request of the county nor in the presence of any officer of the county; nor with the knowledge of any officer of the county. The bank alone solicited and procured the execution of the bond.

That guaranties are absolute and conditional see Spencer on Suretyship, Sec. 340.

"It is necessary to fix the liability of the guarantor that there should be notice of ac-

ceptance of the guaranty and notice of the principal's default."

Spencer on Suretyship and Guaranty, Sec. 340.

An averment in the complaint of due notice of acceptance from the guarantee to the guarantor is necessary.

Law of Suretyship, Spencer, Sec. 42.

It is enough that reasonable notice of acceptance is given. *Douglas vs. Reynolds,* 7 Peters, 113; *First National Bank vs. Carpenter,* 41 Ia. 518.

In the case here the first and only act that might be construed an acceptance by the county was the filing with the county clerk on the 19th, and that only upon the theory that the public record would be notice as no notice was given the Company.

"Where a guarantor signs the guaranty without request of the guarantee, and in his absence, for no consideration except future advances to be made to the principal, the writing is a mere proposal, requiring acceptance and notice thereof to the guarantor in order to bind him. The mere recital of a nominal consideration, without stating whether it comes from the guarantee or the principal, does not effect this rule." Syllabus.

*Barnes Cycle Co. vs. Reed,* 84 Fed. 603.

The following is from the syllabus of *Davis vs. Wells,* 104 U. S. 159:

> "If made at the request of the guarantee, the guaranty becomes the answer of the guarantor to a proposal, and its delivery to the guarantee or for his use completes the communication between them and constitutes a contract. The same result follows where the agreement to accept is contemporaneous with the guaranty and constitutes its consideration. It must be so wherever there is a valuable consideration other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor; and equally so where the instrument is in the form of a bilateral contract, which binds the guarantee to make the contemplated advances, or otherwise creates by its recitals a privity between him and the guarantor. In each of these cases, their mutual assent is either expressed or necessarily implied."

In *Davis Sewing Machine Company vs. Richards,* 115 U. S. 524,, at page 527, the Court said:

> "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the

delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

"The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. *The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted,* or even that the original contract had been executed or assented to by the plaintiff, until long afterwards, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor."

The County Clerk is the one who passes upon and determines the sufficiency of the approval, be-

cause the bond shall not be *"recorded or filed"* by him unless *"so approved."* The treasurer is given no right or power to accept the bond.

## NO SUFFICIENT PROOF OF APPROVAL PRIOR TO FAILURE OF BANK.

(a) The approval is without date. This approval should bear the written date when it was made; it was omitted. This is significant.

(b) July 14 the bond had not been approved and the prosecuting attorney and treasurer had refused and rejected the bond because of its form. (Tr. p. 27).

(c) This bond was not approved until the 19th, after the bank had failed.

The honorable trial court at page 33 of the Transcript, suggests an inconsistency on our part in contending that the treasurer had no authority to accept the bond, but could reject it. His Honor failed to perceive our point. The rejection was by the prosecuting attorney, who by law is made the "legal adviser of the county," and by the treasurer.

> "The prosecuting attorney refuses to approve any bond carrying the pro rata clause, and we ask you to kindly give us a bond in which this item is eliminated, or followed by the following." (From Glazebrook's letter.)

The prosecuting attorney was a witness in the case and testified that he did refuse to approve it. (Tr. p. 55). An alternative proposition was likewise submitted to the Company; that is to say, it must eliminate the pro rata clause or insert a provision which the prosecuting attorney prepared. Certainly the prosecuting attorney had a right to reject the bond, and no officer of the county would accept the bond without it first having the approval of the prosecuting attorney. So, the bond was rejected by both the treasurer and the prosecuting attorney; and it is now contended that those two officers had a right to approve it, and it is their names only which appear without date upon it. If they two had a right to approve they had a right to reject.

But underlying that question is our contention that the bond *was not accepted.* It is not so much a question of whether or not there was an affirmative act of rejection, as it is whether or not it was properly approved and accepted by anyone who had a right to so approve and accept it at any time prior to the 19th. It stands undisputed that both the treasurer and the prosecuting attorney did at one time affirmatively reject it. Having thus rejected the bond they could not, without notice, change their minds and accept it. Since it is the

bank that must procure and file the bond with the county clerk, and the county clerk must determine whether or not it has been properly approved before he is allowed to file it, and since the bank did not present it for filing, *it could not have been approved prior to July 19th* and therefore not accepted.

There was no privity between the surety company and the treasurer as an individual. The bond should have been returned to the bank, and the bank in turn have taken it up with the surety, because the surety dealt only with the bank.

The prosecuting attorney refused to testify when he placed his name on the bond. We submit that this is a very telling circumstance. Mr. O'Phelan simply took the position that he did not remember (Tr. pp. 54-56). It is passing strange that in a matter so important as a bond for $10,000, and one on account of which a question was raised at the time, that the prosecuting attorney should not remember when he approved it. We believe the fact to be that Mr. O'Phelan did not want to swear falsely, and he did *not* want to *swear* against his county, and therefore he stood neutral. Glazebrook testified that he approved it on the 12th, the very day he says the bank delivered it to him; but on the 14th he wrote a letter over his own signature, saying not

only that it was not approved, but was rejected (as we construe the letter). Glazebrook's memory was fresher when he wrote that letter than it was a year later. Mr. Spirk testified that Glazebrook told him that he did not approve the bond until after the date of the letter. "I called his attention specifically to the letter and he said it was after he wrote the letter." (Tr. p. 65). Spirk was there for the purpose of investigating this very matter, and made note of it at the time.

O'Phelan testified that he sent his deputy, Richardson, to the office of Glazebrook *after the bank had failed.* (Tr. p. 56). Glazebrook testified as follows:

> "I stated in the letter that the prosecuting attorney had refused to approve of the bond. I expected, when I wrote the letter that the company would send a new bond. No new bond ever came. *I saw O'Phelan on the 19th, the day the bond was filed.* I took it up on the 19th with O'Phelan and Richardson. Richardson was deputy. I told the prosecuting attorney's office on the 19th that I had not yet filed it." (Tr. pp. 48-49).

> "Q. Then after you and the prosecuting attorney went over those securities, you went up and filed this bond of the Maryland Casualty Company with the clerk?

> A. Yes sir.

> Q. That was after the county atttorney had

gone over with you, over all the securities you had?

A. Yes; it was in the process of going over the securities, of course." (Tr. p. 49).

"I give no notice to the company, except the letter of July 14th. The letter of July 14th constituted the sole and entire notice of any kind which I gave the surety company." (Tr. p. 49).

The prosecuting attorney says that after the bank failed on the 19th he sent his deputy up to see Glazebrook about the securities which the county held. Glazebrook says: "I saw O'Phelan (the prosecuting attorney) on the 19th;" O'Phelan says he saw Glazebrook about the securities on the 19th, and it was in the process of going over the securities that he saw O'Phelan. That is to say, Richardson, the deputy, went up to look over the securities and discovered that the Maryland bond had not been approved, so O'Phelan was sent for and approved it. Following this conference Glazebrook testifies he went in person to the office of the clerk and filed the bond, and then it bore the signatures of Glazebrook and O'Phelan with no date, and it follows as night the day that they put their signatures on the bond at that time, just before they filed it. The testimony of both O'Phelan and Glazebrook shows conclusively that the first time it was determined to file the bond was there on the 19th when

they were going over the securities to see what they held. Glazebrook testified:

> *"I did not file the bond with the clerk, because the company had not sent me bond carrying the clause outlined."* (Tr. p. 50).

Therefore failure to file the bond was no oversight. It was deliberately withheld and not approved.

The honorable trial court, in his memorandum decision, said:

> "The treasurer made $8000 deposits which he could not legally make without the bond."

We direct your Honor's attention upon this point to the fact that Glazebrook was asked whether or not he would have deposited the eight thousand dollars if he had not had the Maryland Surety bond. Objection was made and sustained by the court. (Tr. p. 51). In other words the court would not allow Glazebrook to answer the question as to whether or not he deposited because of this bond, when he may have said that he would. But in the opinion asserts that Glazebrook did deposit it because he had this bond. Without the bond of the Maryland he still had securities in excess of the whole amount on deposit. If the bond of the Illinois Surety is counted, which we insist for the purpose of fixing liability it must have been, for the county at that

time was insisting upon the validity of the Illinois Surety Bond and prosecuting suit upon it, there is not the slightest evidence to the effect that he made any deposit upon the strength of this bond. There should be no such presumption, when he held other securities in excess of the deposit, and when the Maryland bond had neither been approved or filed.

In the face of all the circumstances and in the face of his own letter over his own signature that Glazebrook had not approved or filed the bond on the 14th, it should be assumed that Glazebrook did put his name on it on the 12th, that was not an approval of the bond, because Glazebrook could not alone approve it. It took also the approval of the prosecuting attorney, and then it must be finally *approved by the county clerk.*

## BOND NOT RETROSPECTIVE.

Our contention is that this bond in no event could be held for money on deposit prior to the time of its acceptance.

(a) The complaint alleges that the bond was given to secure money *to be deposited.* (Tr. p. 4).

(b) The language of the bond precludes all idea that it was meant to be given to secure prior deposits.

(c) The authorities outside of three cited by counsel under an entirely different statute, are to the contrary.

The sole and only allegation contained in the complaint as to moneys to be secured, is found in paragraph IV and reads:

> "County's moneys and funds 'to be deposited' in the said First International Bank."

That can mean only moneys thereafter to be deposited. The bond provides with reference to funds "to be deposited in the said bank, the amount whereof shall be subject to withdrawal." (Tr. p. 9). That is to say, the moneys *to be deposited* shall be subject to withdrawal; not moneys which have heretofore been deposited. "Whereas the said bank in consideration of *such* deposit," that is the deposit to be made referred to above. "A part of *such* deposit;" still no reference to any past deposit. "Shall well and truly keep all *such* sums of money so deposited or to be deposited as aforesaid."

The honorable trial court was governed, as appears from his memorandum decision, by the words "so deposited," and says otherwise such words are meaningless in the bond. But to us it is entirely clear that "so deposited" refers back to the words "to be deposited." After the use of the words "to be deposited," every future reference is to the

words "to be deposited." This is made perfectly clear by what follows.

*"As aforesaid."* "As aforesaid" can mean only the words "to be deposited"—"so deposited" or "to be deposited as aforesaid" can mean only the money *to be deposited* after the giving of the bond. Again, the bond provides that the county is to be held harmless "by reason of the making of said deposit or deposits" making it clearly refer to the agreement in the bond that it is moneys to be deposited; otherwise the bond would have said "moneys now on deposit," or "moneys having been deposited prior to the execution of the bond." Counsel cite *Myers vs. Board of Commissioners,* 56 Pac. 11; *Brown vs. Board of Commissioners,* 50 Pac. 888; but the Kansas Statute makes the bank a county depositary and compels the treasurer to deposit all money therein daily. The treasurer has no discretion, and if the bank fails the treasurer is released. He assumes no obligation. Under the Washington Statute he can keep the money where he pleases. He can put it in his stocking if he likes. The Statute expressly provides that the money is considered to be *in the hands of the treasurer,* and that the treasurer shall not be released upon his *official bond;* not his depositary bond. The statute cited by the court upon official bonds has no

application. This bond has no language in it that may be construed to be a guaranty against any default of the treasurer, nor for neglect, malfeasance or wrong doing, and it is therefore in no sense under our statute an official bond of the treasurer or to the treasurer, but his official bond is made expressly liable for the money.

Therefore the Kansas decisions have no application. Counsel cited *Buhrer vs. Baldwin,* 100 N. W. 468. There the act made it the duty of the county treasurer to deposit daily his entire receipts, and in that case is this language:

> "If this suit is to be regarded as the personal suit of the county treasurer, who has violated the statute, there would be great force in this contention."

It is a little difficult to tell who is the plaintiff in the case at bar. It was brought jointly by the treasurer and the county. The treasurer is the most interested because he is liable to the county upon his official bond, and the Michigan case intimates that if he were prosecuting the suit he would be estopped, just as we are urging that Glazebrook is estopped here. As to Pacific County, it is not so much a question as to what Glazebrook did or failed to do, as it is a question of *when,* if ever, Pacific County, its clerk, or its board of county commissioners, ac-

cepted this bond. The Kansas statute reads.

> "In all counties having a population of less than 25,000 inhabitants the county treasurer shall deposit daily all public money in some responsible bank or banks located at the county seat, to be designated by the Board of County Commissioners."

It is further provided that the *board* shall take the bond.

All that is required under the Washington Statute is that any bank which desires to become a county depositary must upon its own initiative, and at its own expense, give bond, and when it has done so it is qualified to receive deposits, if otherwise properly designated. In larger cities where there are several banks all qualified as county depositaries, public officials, may deposit in any one or in all of them, or in a tin can.

> Pingrey on Suretyship and Guaranty, page 83, 349.
>
> *National Bank of Commerce vs. Rockerfeller,* 174 Fed. 22.
>
> "A guarantee may be retrospective in its operation as to embrace debts or contracts where it appears that such was the intention of the parties, *but such construction can only be given to a guarantee where by express words or by necessary implication it clearly appears to be the intent of the parties to embrace past contracts.*"
>
> Pingrey on Suretyship and Guaranty, Sec. 339.

"Commercial guaranties are in extensive use and should receive the liberal construction that is given to other contracts. In such construction technicalities should be excluded and the intention of the parties as it may be gathered from all parts of the contract should prevail. *The guarantor's liability must not be enlarged by implication.*

Pingrey, Sec. 356.

"It is a rule of very general application that all guaranties are prospective and not retrospective in operation unless the contrary appears by express words or by necessary implication."

174 Fed. 22 *supra.*

Counsel cited *Kephart vs. Buddecke,* 80 Pac. 501. We find in that decision the following language: "And whereas large sums of money have accumulated in the City Treasury which have been so deposited and which may continue to so accumulate." (From the recitals in the bond, 80 Pac. 502.)

Therefore, in the Colorado case the bond expressly recited that it was given to secure money already on deposit, as well as that to be deposited. The court said the answer to the question as to what funds were secured by the bond, must be found in the recitals and conditions of the instrument. (page 503). Our recital, instead of being for moneys accumulated, says *moneys to be deposited,* and we be-

lieve this case to be authority for our contention. Furthermore, the recitals in the bond at bar, referring to funds, says: "current funds." It is "current funds" which "*shall be subect* to withdrawal," not "*are subject* to withdrawal." "Current funds" can mean only funds contemporary with the bond.

The words "so deposited" on which the trial court based his decision on this point, are nowhere contained in the recitals or whereases of the bond, and under the Colorado case the words referred to in the conditions must be construed as relating back to the recitals, and when you read the recitals in our bond there is not a word in the past tense; no word referring to the past; not a single recital that the treasurer had ever placed a single penny on deposit in that bank at the date of the bond. The Surety had no knowledge that Glazebrook had made prior deposits and it need not inquire because its bond was not made to guarantee such. Under the law, the bank could only have become a legal depositary ten days prior to acceptance of the bond, yet, the decision here would make it liable for monies deposited a year before. The language used in the analysis of the bond provision in the Colorado case, is most pursuasive here.

The probabilities are all against any such construction as is now contended for and it is proper

for the court to consider the probabilities.

*Wheeler vs. Buck,* 23 Wash. 679; 63 Pac. 566;
*Pederson vs. Parks,* 68 Wash. 482; 123 Pac. 777.

Is it at all probable that this surety was agreeing for a nominal premium to become liable for an existing indebtedness of fifty-two thousand dollars ($52,000)? Was it for such nominal consideration to become liable for the payment of a debt of another already contracted?

*The complaint in the case nowhere alleges that any money was on deposit at any time prior to the 19th day of July.* The allegation is that on said 19th day of July, 1915, there was actually on deposit in the said First National Bank, a banking corporation, the said county depositary, the sum of $52,497.97. (Tr. p. 4). There is no allegation that the bank had any money on deposit on the 17th, the day the bank closed, or at the date the bond is alleged to have been approved, or at any date prior to the 19th, and there is no evidence of that fact. We objected to any evidence under the complaint upon the ground that the only allegation as to funds was as to money "to be deposited," and that no allegation was made that any were deposited prior to the 19th.

No application was made to amend, and we

moved for judgment at the close of plaintiff's evidence on the ground that the complaint stated no cause, and that the evidence proved none, and we submit that this court can now consider only such evidence as was properly received under the complaint.

The complaint nowhere alleges the filing of the bond or when it was filed; it nowhere alleges its approval or that it ever was approved; it nowhere alleges an acceptance or any notice of acceptance, and we submit that our objection to evidence under this complaint was well taken and that our motion for judgment at the close of the evidence should have been sustained.

In *St. Louis County vs. American Loan & Trust Company,* Minn. 69 N. W. 704, the bond recited that the trust company "*has been* duly designated a depositary," and was conditioned that the trust company shall well and truly pay over on demand according to law all of said funds which shall be deposited. The court said:

> "It must be held from the complaint that the County Treasurer deposited County funds with this trust company before the date of the execution of the bond and before there was any shadow of claim that the trust company had been designated as a depositary at all. We cannot hold that this bond secures the repayment of such funds."

And further,

"There is no allegation in the complaint that the trust company ever was designated a depositary unless the recital in the bond so set out as an exhibit in such an allegation. Said Section 730 provides: 'Before any national, state or private bank or banker shall be designated as such depositary such bank or banker shall deposit with such treasurer a bond payable to such County and signed by not less than five free-holders of the state as sureties, which bond shall be approved by the Board of County Commissioners.' This requires that the bond so approved shall be deposited with the County Treasurer before the depositary is designated. In view of this statute we cannot hold that such recital in the yet unapproved and inchoate bond that the trust company has been duly designated a depositary, etc., is a suffiicent allegation in the complaint that it has been so designated."

In *Kuhl vs. Chamberlain,* Ia., 118 N. W. 776, the law as to designating depositaries and filing bonds was not complied with by the Treasurer who sought to enforce the bond as a common law one. The Court said:

"The bond having been delivered to the plaintiff there was sufficient appearing upon its face to put him upon inquiry and to charge him with notice that it was intended as a statutory bond. He could not by his own failure to approve and by his own failure to present it to the board of supervisors for approval, convert it from the one class to the other to his own

private benefit. * * * It will not do for us to say, therefore, that we depart from the terms of the bond and hold the surety liable to the plaintiff as for failure on the part of Green (the depositary) to pay a private debt to the plaintiff simply because the funds deposited lost their public character and because the plaintiff in dealing with Green lost his official character through his own failure to comply with the requirements of the law."

## CONSTRUCTION

While a compensated surety is not allowed to enforce the old rule of *strictissimi juris* as applied to voluntary sureties, the contract of a compensated surety is still to be construed as any other contract, and may not be extended by implication.

Pingrey on Suretyship & Guaranty, 78-371.

Our own Supreme Court has adopted this doctrine, in *Black Masonry & Contract Co. vs. National Surety Co.,* 51 Wash. 471.

"It has been said in many of the older and a number of modern decisions however, and has been reiterated by text writers, that the undertaking of a guarantor or surety is *strictissimi juris,* and that a strict construction in favor of the guarantor or surety of the language employed should be adopted and all doubts resolved in his favor. In spite of this it is the better and practically universal modern opinion, that the words used in such a contract

should be construed the same way as the words used in other contracts, reasonably and with a view to ascertaining the true meaning, and intention of the parties, and that the same rules should be applied as in ascertaining the meaning of the language employed as in other cases of doubt and dispute. And it has recently been said that the rule of *strictissimi juris* as applied to contracts of suretyship is a rule for the application of such contract after their meaning has been ascertained and not properly a rule of construction at all. In other words, the meaning of the language actually used in such contracts is to be ascertained by the same rules and principles and with reference to the same extrinsic facts and circumstances as is the meaning of any other contract, but when the meanof the terms employed has been thus ascertained, the surety has a right to stand upon the strict terms of his undertaking, which will not be extended by implication to persons, subject matters, or periods of time not embraced within those terms. He is not liable upon any implied engagement where a party contracting in his own interest might be, and has the right to insist on the strict performance of any condition for which he has stipulated, whether others would consider it material or not, and the contract is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it." Spencer on Suretyship, Sec. 90.

Authorities cited by counsel are cases where the bonds had been given long prior to the failure, and the questions discussed were whether or not the

bonds were valid or invalid. In bonds as other contracts there must have been a meeting of the minds.

Here we urge a decision of the question of whether or not this bond can be held liable when it was not filed or accepted until subsequent to the failure of the bank. There never was a meeting of minds upon the conditions of the bond. Counsel cited no authority upon the question of whether or not this bond became effective as such prior to the 19th. No authority is presented upon the question of whether or not the minds of the surety and the county ever met upon this contract, it having once been rejected as written. Surely they did not prior to the 19th. Had this bank failed nine or ten months subsequent to the time of filing the bond, and it had remained on file during that time without any objection on the part of the surety, and deposits in the meantime had been made, some of the authorities cited would be in point, but that is not the question involved here.

Mr. Whalley testified that he received the letter of the 14th in Seattle on Saturday afternoon, July 17th, after business hours. (Tr. p. 57). He gives the circumstances, account of which he especially remembers the fact.

Mr. Cran testified that Calhoun, Denny and Ewing received the letter on Monday the 19th (Tr.

p. 58). Whalley says he sent it to them and they were the agents who wrote the bond. Calhoun, Denny & Ewing sent it to counsel for the company, and thereupon the company immediately notified Glazebrook that it would not execute a bond without the pro rata clause.

Plaintiff in the lower court admitted that if filing was a prerequisite that this bond was not filed within time, but he treated the matter as though we were urging a defect in the filing. It is not a question of whether or not the filing itself was informal or defective, but the question is whether or not, the bank having failed prior to the filing and approval of the bond, the surety may still be held liable. While we urge the proposition that this bond was never legally approved or accepted, yet if the court shall find it was, then the question is *when was it accepted and filed?*

There could be no estoppel as against the surety so long as the contract was executory. This contract was executory until filed with the Clerk. There could be no estoppel prior to the 19th.

## JUDGMENT EXCESSIVE

If the court should determine that this bond became effective prior to July 19th, we still submit that the bond could in no event become liable for

more than its pro rata share of $8000. We objected to the introduction of the evidence showing a deposit of $4000 on the 13th and $4000 on the 14th, because there was no such pleading. A $4000 check was drawn on the 14th, so that the amount was not augmented, but if the court shall hold that it was proper to receive evidence of these two deposits, we submit:

First. That only the one deposit for $4000 can be considered, because the other was checked out on the same day; and

Second. That if the court considers the deposit to have been increased by the entire $8000, then this surety could be held only for its pro rata share of $8000.

The language of the bond is: "The surety shall only be liable for such proportion of the total loss or damage sustained by such obligee, by reason of any default of the principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to." "Above referred to" are monies "to be deposited."

At the time, the county held bonds and securities of the face value of $66,000, and we still insist that since the county asserted claim against the

Illinois Surety, and was suing it at the same time, its bond should be counted; but even if the court elimiantes the bond of the Illinois Surety, in no event should the judgment against the Maryland be more than 10/56 of $8000.

Following is our comment upon cases cited in the memorandum opinion of the trial court:

*Board of Commissioners vs. Duluth,* 77 Northwestern 815. Case not in point. It held merely that when the Treasurer loaned money on a time Certificate of Deposit at 3% without any authority, the money to all intents and purposes was deposited on demand at 2% and therefore within the provisions of a bond securing such demand deposits.

*People vs. Edwards,* 9 California 286.

This case is not in point. It involved simply the meaning and construction of a Sheriff's official bond. There was no question of a *depositary* bond.

*Deerlodge County vs. U. S. F. & G. Co.,* 112 Pac. 1060.

This case involved the *official* bond of a County Treasurer. Defects in the approval of this bond were held not material under a statute similar to Rem. & Bal. 8327. There was no question of a *depositary* bond.

*Buhrer vs. Baldwin,* 100 Northwestern 469.

This was a suit on a depositary bond. It was contended that the surety never received notice of acceptance of bond. The court said:

> "We think the true theory upon which guarantors are entitled to notice of acceptance is that their undertaking is a mere offer and does not become a binding contract until such notice. See *Davis vs. Wells,* 104 U. S. 159, 26 L. Ed. 68.
>
> "It results from this theory that guarantors are entitled to notice of acceptance only when their undertaking can be construed to be an offer of guaranty. *When, however, the undertaking recites a consideration,* though, as in this case, that consideration is merely nominal, conclusive evidence is furnished that the *guaranty has been made with the assent of the obligee* communicated to the guarantors, and *in such cases* notice of acceptance is unnecessary." (Italics ours.)

Clearly the case at bar is not such a case as *Buhrer vs. Baldwin.* Here the bond did not recite a consideration, nor is there any showing that the guaranty was made with the assent of the obligee communicated to the guarantors.

*Keppeart vs. Buddecks,* 80 Pacific 501.

The bond was held to include present as well as future deposits, but only because of the preliminary recital, "Whereas, large sums of money *have accumulated* in the State Treasury which *have been*

so deposited (in divers banks). The court said, "The undertaking was prefaced by a recital of deposits *previously* made in divers banks. The bank could not keep money which it did not have. The money which it was bound to keep must, theretofore have been deposited with it, and as the only recital which gives the undertaking any intelligibility refers to "divers banks," the implication that the Bank of Montrose was one of the "divers banks" assumes the character of certainty."

Very different is the recital in the present case, that "Whereas, the International Bank has been designated as a depositary of funds *to be deposited.*"

*Meyers vs. Board of Commissioners,* 56 Pac. 11.

In this case, the recital was "Whereas, said bank has been designated as a depositary * * * if the said bank, so long as it shall remain the depositary, shall promptly pay *any* and *all of said funds.*" There are no such retrospective words as *"any and all of said funds"* in the case at bar.

*Brown vs. Board of Commisisoners,* 50 Pac. 888.

In this case, the condition of the bond was that "If the bank shall promptly pay *any and all deposits* of the County which may be so deposited with it." There was no preliminary recital that the cur-

rent funds were to be deposited as in the case at bar.

The approval and filing of the bond was an afterthought craftily conceived.

The bond was not accepted because it was different from every other bond held by the County. The Maryland bond alone carried the pro rate clause. They had rejected all bonds containing that clause. The Maryland would write no bond without it. They wanted uniformity and the prosecuting attorney demanded it (Tr. p. 56). The Maryland never agreed to write a bond without the pro rate clause, and the County never agreed to take a bond with it.

When the bank was running and they held plenty other security, and they suspected no danger, they refused our bond; it was not good enough for them; but when the deluge came on that fatal 19th day, with a tergiversation worthy of a Machiavel, they rushed off to the clerk and made an *ex-parte* filing of the bond.

We respectfully submit the cause should be reversed and dismissed.

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